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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 41

GENERAL UTILITIES AND OPERATING COMPANY,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

REPLY BRIEF FOR PETITIONER.

R. KEMP SLAUGHTER,
HUGH C. BICKFORD,
JOSEPH A. SLATTERY,
Attorneys for the Petitioner.

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In reply to the brief of respondent we wish simply to call attention to several omissions therefrom and to place in the record some authorities made necessary by such brief. The omissions from respondent's brief are, in the main, two in number.

1. *The respondent fails to connect his argument with the facts as stipulated in this case.*

The respondent argues generally a number of propositions of law concerning the nature of income under different circumstances and sets forth his viewpoint that an appreciation of value should be taxed because such appreciation is an economic increment. At least, so we understand his argument. At no place in this argument does the respond-

ent quote the portions of the stipulated facts upon which he relies. In fact, he carefully avoids such stipulated facts. He argues (p. 13-14) that petitioner corporation made a "sale or other disposition" but ignores the stipulated fact that "at no time did" petitioner "agree • • • verbally or in writing • • • to make sale." (R. 16.) He argues that petitioner "transferred" its stock (p. 15) without stating that it is stipulated that the "transfer" was simply by dividend distribution and that "petitioner received no cash or other property for the distribution." He argues that if the corporation is not taxed on the appeciation in value such appreciation "will never be subject to tax," and ignores the fact that the entire appreciation *was* taxed to the stockholders who received it. In the final phases of his argument, he contends (p. 34-37) that the stockholders were the agents of the corporation but does not cite any portion of the stipulation which establishes a contract, appointment, or acceptance of agency. He ignores the stipulated facts which establish that the stockholders received full title to the stock and acted for themselves in selling. (R. 15-16.)

In short, counsel argues general principles of law without connecting them with the stipulation of facts in this case. For example, on pages 35 and 36 he cites a number of cases in which agency was held to exist although some single element was lacking in each case. He has not (and we believe, cannot) cite a case in which it was held that an agency existed where no element of agency was established as a fact.

2. *The brief of the respondent does not refer to the provision of the revenue act expressly answering the argument which he makes.*

The respondent, at great length, argues that appreciation in value is an economic benefit which should be taxed;

that when the appreciation no longer could be extended, because the stock was distributed, there was an economic gain. He founds this upon Section 111 (a) of the Revenue Act which provides that the gain shall be the excess of the "amount realized" over the cost or other base and submits economic doctrine and legal theory to show what is the meaning of the phrase "amount realized." He does not mention the fact that the phrase "amount realized", which alone may be taxable gain, is expressly defined by subdivision (c) of section 111 as follows:

> "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

There is therefore no necessity for substituting economic theory or legal doctrine for the express definition of the statute as to what is meant by the amount realized. The statute says that it shall only be the "money received" or the money equivalent in other property received. The stipulation of fact here answers this definition. It is stipulated, plainly, that the petitioner "received no cash or other property for the distribution of said 19,090 shares of the Islands Edison Company common stock." (R. 18.) If the statute taxes only the money received and it is stipulated that none was received it would seem clear that no income taxable by the statute was present.

As to respondent's general argument of economic doctrine, it should be sufficient to quote Mr. Justice Holmes' expression in *Weiss* v. *Weiner*, 279 U. S. 334:

> "The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value

unless realized in money received by a sale. *United States* v. *S. S. White Dental Co.*, 274 U. S. 398, 401. A stockholder does not pay for accumulated profits of his corporation unless he receives a dividend. That is the general principle upon which these laws go."

Finally, the whole effect of respondent's argument is to ignore entirely the corporate entity and to treat petitioner as identical with its widely scattered 33 stockholders. As no unusual or peculiar circumstances are present in the case, such reasoning is contrary to the consistent expressions of this Court since the enactment of the 16th Amendment. *Lynch* v. *Hornby*, 247 U. S. 339; *Eisner* v. *Macomber*, 252 U. S. 189; *U. S.* v. *Phellis*, 257 U. S. 156; *Rockefeller* v. *U. S.*, 257 U. S. 176; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *Burnet* v. *Clark*, 287 U. S. 410; *Dalton* v. *Bowers*, 287 U. S. 404; *Jones* v. *Helvering*, 71 F. (2) 214 (App. D. C.).

Respectfully submitted,

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